The Law Society of Saskatchewan

DANIEL KWOCHKA
APPLICATION #1 HEARING DATE: October 25, 2017
REASONS FOR DECISION DATE: October 27, 2017
APPLICATION #2 HEARING DATE: December 4, 2017
REASONS FOR DECISION DATE: December 21, 2017
HEARING DATE: January 15, 2018
DECISION DATE: January 26, 2018

***Law Society of Saskatchewan v. Kwochka*, 2018 SKLSS 2**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF DANIEL KWOCHKA,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN ON AN APPLICATION TO HEAR EVIDENCE BY ELECTRONIC MEANS

INTRODUCTION

1. The Conduct Investigation Committee applied for an order of the Hearing Committee that a witness be permitted to testify by electronic means.

2. The application was heard by teleconference before a hearing committee comprised of Martin Phillipson, Chair, Della Stumborg and Bryan Salte, Q.C.

3. Drew Plaxton, Q.C. represented the Conduct Investigation Committee. Gordon Kuski, Q.C. and Holli Kuski Bassett represented Daniel Kwochka.

4. For the reasons which follow, the Hearing Committee dismisses the application, but without prejudice to the ability of the Conduct Investigation Committee to bring a further application if there is a significant change in circumstances.

PRELIMINARY MATTER

5. Mr. Plaxton on behalf of the Conduct Investigation Committee raised the issue of sections 48(9) and 49(6) of *The Legal Profession Act, 1990* which state:

> "48 (9) Subject to subsection 49(6), the hearing committee shall conduct all hearings in public.
>
> 49 (6) The hearing committee may exclude the complainant or the public from any part of the hearing if the hearing committee is of the opinion that:
>
> (a) evidence brought in the presence of the complainant or the public may result in a breach of solicitor and client privilege; or
>
> (b) the possible disclosure of intimate financial or personal matters outweighs the desirability of allowing the complainant or the public to be present during part of the hearing."

6. The application was heard by teleconference without the ability of members of the public to be present for the application.

7. Mr. Kuski, on behalf of Mr. Kwochka stated that he did not object to the preliminary application being heard by teleconference and provided an undertaking on behalf of Mr. Kwochka that the issue would not be made the subject of an appeal.

8. The Hearing Committee concluded that sections 48(9) and (49(6) of *The Legal Profession Act, 1990* did not prevent the committee from dealing with the preliminary application by teleconference. No evidence was heard, and the only issue was whether the witness would testify by electronic means or in person. Section 36(3)(c) of the Act states that the discipline committee can "determine its procedure" and can "establish a method by which the discipline committee and hearing committees shall decide questions".

9. The Hearing Committee concluded that the documents provided in relation to the application and the reasons for its decision would be part of the record and publicly available when the hearing dealing with the merits of the charges commences.

THE POSITIONS OF THE PARTIES

10. Mr. Plaxton on behalf of the Conduct Investigation Committee highlighted the reasons for the application – the cost of bringing the witness to the hearing, the reluctance of the witness to travel to Saskatchewan to testify and the inconvenience to the witness if required to testify in person.

11. The airfare for the witness to travel for the hearing would be approximately $2,100.00 to $6,200.00 and there would be additional costs for meals, accommodations and witness fees. If the witness testifies for three days, the witness would be required to be absent from her home community and her employment for approximately 7 days.

12. Mr. Plaxton's position was that the court decisions referenced in the arguments were decided at a time when telephone was the means of testifying electronically. His position was that

those decisions have limited relevance as technology now permits witnesses to testify by audio-visual means in which the witness can be seen by the committee and documents can be easily transmitted for a witness to consider by FAX or email attachment (pdf).

13. Mr. Kuski, on behalf of Mr. Kwochka, opposed the application. He argued that the witness will be an important witness. He stated that the credibility of the witness is likely to be an issue. He stated his position that if the witness is not personally present, it will be more difficult for him to effectively cross-examine the witness.

14. Mr. Kuski stated his concern that it may be difficult to effectively refer the witness to documents during the course of cross-examination. Mr. Kuski expressed his concern that the stakes for Mr. Kwochka in this hearing are high and that allowing the witness to testify by electronic means could hamper his ability to effectively provide a defence for Mr. Kwochka.

RESPONSE TO COMMITTEE QUESTIONS

15. Mr. Plaxton advised the committee that he hoped that it would not be necessary to introduce any documents into evidence through the witness and hoped that all documents could be entered by agreement with Mr. Kuski.

16. Mr. Plaxton advised that the Conduct Investigation Committee had not determined what electronic means would be available to take the witness' evidence and that if the Hearing Committee granted the application, it should do so on the basis that suitable arrangements can be made.

17. Mr. Kuski confirmed that there may be significant credibility issues related to the testimony of the witness.

18. Mr. Kuski confirmed that Mr. Kwochka was aware that if the Hearing Committee concludes that Mr. Kwochka is guilty of conduct unbecoming the costs of the discipline proceeding may be assessed against him, which could include the costs for the witness to travel to Saskatchewan for the hearing.

REASONS FOR DECISION

19. The Committee reviewed the decisions from the Court of Queen's Bench referenced in the arguments and concluded that they were of limited assistance. In particular, the rule in effect at the time of those decisions required either the consent of the parties or "where it may be necessary for the purposes of justice".

20. In the view of the committee, the use of the word "necessary" imposes a higher threshold to be met than is appropriate in hearings before a discipline committee of the Law Society.

21. The Committee concluded that section 36(3)(b) of the Act and Rule 450 gives it the discretion to order that a witness will be permitted to testify by electronic means.

22. In deciding the application, the Hearing Committee considered two matters:

1) Whether allowing the witness to testify by electronic means would unduly affect Mr. Kwochka's right to a fair hearing or would otherwise breach principles of fairness;

2) Whether permitting the evidence to be given by electronic means would potentially affect the ability to hold an orderly and effective hearing.

23. The Hearing Committee was not convinced that the information provided to the committee demonstrated that allowing the witness' evidence to be given by electronic means would result in unfairness to Mr. Kwochka. While there was no information provided about the nature of the electronic connection between the Discipline Hearing and the location of the witness, the committee was not prepared to conclude that an appropriate audio-visual connection would not permit effective cross-examination of the witness, nor was the committee prepared to conclude that if there was an appropriate audio-visual connection in which the committee could observe the demeanour of the witness, it would hamper the committee's ability to assess credibility.

24. The Hearing Committee noted that while the information before the committee indicated that the witness was reluctant to travel for a hearing, the information did not support a conclusion that it would be an undue hardship for the witness to travel, nor did the information indicate that the witness would not attend the hearing if placed under subpoena. Mr. Plaxton advised the Hearing Committee that he was in the process of arranging an interprovincial subpoena to require the witness to attend to provide evidence.

25. This is not a situation where a witness is unable to travel to testify, or where a witness has refused to testify unless permitted to do so by electronic means.

26. The Hearing Committee noted that the evidence of the witness could take as long as three days. The Committee was not convinced that having a witness testify for that length of time by audio-visual means would result in an orderly and effective hearing. In particular, if during the testimony the Committee reached the conclusion that allowing the evidence by videoconference was problematic, the only option would be to adjourn the hearing for a sufficient length of time to allow arrangements to be made for the witness to testify in person.

27. The Hearing Committee concluded that the cost to the Law Society for the witness to travel was not an important factor in its decision.

28. The cost of the hearing which is scheduled for in excess of two weeks will be very significant and the cost saving associated with permitting evidence by electronic means, assuming that could be done effectively, would represent a small part of the total cost for the hearing.

29. If the Committee concluded that the evidence could be heard by electronic means, but during the course of the hearing it became necessary to adjourn the hearing for the witness to testify in person, the additional costs would likely be more significant than the costs associated with the witness testifying in person at first instance.

ORDER

30. For the reasons above, the Hearing Committee declines to make an order permitting the witness to testify by electronic means.

31. If there is a significant change in the facts which were the basis for the application by the Conduct Investigation Committee, the Conduct Investigation Committee can make a further application to the Hearing Committee.

Dated the 27th day of October, 2017.

"Martin Phillipson", Chair

"Della Stumborg"

"Bryan Salte, Q.C."

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN ON AN APPLICATION RE THE ADMISSIBILITY OF THE "BARCLAY REPORT."

INTRODUCTION

32. Counsel for the Conduct Investigation Committee (the "CIC") has asked the Discipline Committee to admit the report of Ronald Barclay, Q.C. (the "Barclay Report") into evidence at the discipline hearing of Mr. Kwochka.

33. The position of Counsel for Mr. Kwochka is that the report is not admissible and should not be considered by the Committee.

34. For the reasons that follow, the Committee has concluded that:

1.) The Barclay Report is admissible as it relates to findings of fact that are not findings of fact related to Mr. Kwochka's conduct;
2.) The findings of fact and comments made in the Barclay Report related to Mr. Kwochka are not admissible in evidence;
3.) The parties are free to introduce evidence which is inconsistent with or which contradicts the findings of fact in the Barclay Report. The Committee is not bound to accept the findings of fact from the report;
4.) The Committee will determine what weight, if any, will be given to the findings of fact in the Barclay Report.

BACKGROUND INFORMATION

35. Ronald Barclay, Q.C. was initially appointed to conduct an investigation pursuant to Section 396 of *The Municipalities Act*. Subsequently, he was appointed as an Inquiry Officer pursuant to s. 397(3) of *The Municipalities Act*.

36. The terms of reference were contained within the report. The terms of reference authorized The Inquiry Officer to inquire into the appropriateness of the conduct of members of Council and agents of the Rural Municipality of Sherwood No. 159 in relation to developments proposed in the Rural Municipality, referred to in the Barclay Report as "Wascana Village Developments". The terms of reference also required that the Inquiry Officer provide notice to persons if he was considering making an adverse finding in relation to their conduct. Paragraph 3 of the terms of reference stated:

> "3. I consider it necessary to appoint he Honourable R.L. Barclay, Q.C. as an Inquiry Officer pursuant to subsection 397(3) of The Municipalities Act to inquiry into the conduct of members of council and agents of the municipality and the affairs of the municipality in relation to the matters identified in the terms of reference set out in Schedule "A" attached hereto, concurrently with his duties as an Inspector."

37. The Inquiry Officer provided notice of potential adverse findings to the former reeve of the Royal Municipality, Kevin Eberle. The conclusions of the report are set out in pages 138 to 141. Among the conclusions was:

> "Despite being advised to disclose his pecuniary interest to Council and the Administrator in the April 2013 Opinion, I find that Reeve Eberle did not do this. While he may have disclosed to some Councillors that his land was sold subject to rezoning, he did not disclose this fact to all Councillors. At no time did he tell anyone that he was sharing profits with the Developer over the entire Development which profit sharing started in April 2013 and continues to the present time. Faced with this scenario, identifying and disclosing the nature and extent of this interest was something the April 2013 Opinion, and indeed, common sense, required. It is inconceivable to me that someone in such a gross conflict could keep this secret and continue in an elected capacity to advance the Development both directly and indirectly.
>
> The evidence clearly established that Reeve Eberle sought to exert influence in relation to the Wascana Village Concept Plan that was needed to meet the conditional approval to the RM's 2013 OCP Amendments to include Wascana Village. Of all the conduct at issue, I find Reeve Eberle's involvement in this matter the most egregious. It is not excusable under any standard of conduct and demonstrates a clear preference of his own interest over those he was elected to represent. I have little hesitation in concluding that Reeve Eberle should have had absolutely no involvement in the Concept Plan and his decision to the contrary was highly inappropriate.
>
> I find that Reeve Eberle had a serious conflict of interest and failed to act in accordance with his Oath and in the best interests of the RM. Instead he sought to advance Wascana Village in numerous respects, most notably, directing the RM's CAO Ms. Kunz to withhold unfavorable commentary, procure a water source and destroy documents. Reeve Eberle was to receive millions in compensation for his

> lands. Additionally, he was also entitled to share in the profits of the entire Development, his share of which being estimated in the tens of millions. His conduct in advancing Wascana Village was highly unethical.
>
> Reeve Eberle's actions fall far below any standard by which I was asked to assess his conduct. Unfortunately, the opportunity to earn significant profits has interfered with his moral compass.
>
> In sum, the conduct of Reeve Eberle, as outlined above, coupled with his lack of recognition of the effect of this conduct, and lack of remorse, has left me to conclude that serious damage has been done to the office of Reeve as well as to the integrity and credibility of the RM as a whole."

38. The Barclay Report also contained references to Mr. Kwochka's involvement in providing legal advice to the developer of the Wascana Village Development and the Royal Municipality.

THE POSITION OF THE PARTIES

39. The CIC's position is set out in paragraphs 1, 2 and 3 of its brief:

> "1. The CIC's position is the Barclay Report is admissible and ought to be admitted into evidence and accepted with the following riders:
>
> (a) With the exception of matters specifically dealing with Mr. Kwochka's conduct all findings of fact, inferences drawn from findings of fact and determinations of matters of law are to be taken to be binding upon the Hearing Committee.
>
> (b) Specifically, in relation to findings of fact, inferences drawn from findings of fact and determinations of matters of law specifically related to Mr. Kwochka's conduct, although the same may not be binding upon the Hearing Committee, the Commission's findings of both fact and law should inform the Hearing Committee in its determinations.
>
> (c) The determination of whether Mr. Kwochka is guilty of conduct unbecoming a lawyer or has otherwise breached *The Legal Profession Act* or *Code of Conduct* is and remains within the purview of the Hearing Committee.
>
> 2. Alternately, if the Hearing Committee determines the matters set forth in subparagraph (a) are not binding upon it, the CIC's position is the same should be considered *prima facie* proof of the matters set forth in subparagraph (a).
>
> 3. Further, it is submitted the parties are entitled to present such additional evidence as they see fit concerning issues before the Hearing Committee, provided however, this evidence cannot undermine nor contradict findings of the Inquiry Officer that are binding upon the Hearing Committee."

40. Mr. Kwochka's position is set out in paragraph 3 of his brief:

> "3. Mr. Kwochka submits that there is no basis on which to admit the Barclay Report as evidence in the proceedings against him:
>
> a. The Report is presumptively inadmissible hearsay;
>
> b. The Report is not admissible under the "public document" exception to the hearsay rule;
>
> c. The Barclay Report is not admissible under the principled approach to hearsay; and
>
> d. Even if it were admissible under either the public document exception or the principled approach, its probative value is low, while its prejudice to Mr. Kwochka is high.
>
> The Report should therefore be excluded irrespective of its admissibility under the hearsay rules."

ANALYSIS – IS THE BARCLAY REPORT ADMISSIBLE?

41. Fundamental to the Committee's decision is section 48(10) of *The Legal Profession Act, 1990* which states:

> "(10) A hearing committee may accept any evidence that it considers appropriate and is not bound by the rules of law concerning evidence."

42. The Committee accepts the analysis of the Ontario Court of Appeal in *City of Toronto and Canadian Union of Public Employees, Local 79*, (1982), 35 O.R. (2d) 545 that the fact findings of a report such as the Barclay Report are "evidence" and, consequently, can be admitted into evidence at a Law Society Discipline Hearing.

43. The conclusion that fact findings of a Tribunal, or in this case an inquiry, are "evidence" to which section 48(10) applies is supported by other decisions such as:

- *Toronto (City) v. the Canadian Union of Public Employees, Local 79*, {2003] 3 S.C.R. 77.
- *Law Society of Upper Canada v. Dzelme*, 2014 ONSC 4652.

44. As the fact findings of the Barclay Report are "evidence", the issue for the Discipline Committee is whether it is appropriate to accept all or a portion of the Barclay Report into evidence.

45. Counsel for Mr. Kwochka argued that the report is hearsay and that the report is not admissible under the public document exception to the hearsay rule. In support of that position he

referred to *Robb v St. Joseph's Health Care Centre*, 31 C.P.C. (4th) 99, aff'd 152 O.A.C. 60 (ONT.C.A.). The Committee accepts that the Barclay Report would likely not be admissible in a civil action subject to the rules of evidence in court proceedings. However, s.48(10) of *The Legal Profession Act, 1990* does not require that the evidence be admissible in a civil proceeding.

46. Counsel for Mr. Kwochka also argued that the report is hearsay and inadmissible under the principled approach to hearsay. It fails to satisfy the necessary indicia of reliability and necessity. In support of that argument he referred to *R v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787. The Committee did not analyze the admissibility of the Barclay Report using the principles from *Khelawon*.

47. *Khelawon* was a criminal decision subject to the rules of criminal evidence. Section 48(10) of *The Legal Profession Act, 1990* does not require the Committee to evaluate the admissibility of evidence using principles that apply in civil or criminal trials. Rather that section states that "A hearing committee may accept any evidence that it considers appropriate and is not bound by the rules of law concerning evidence." Courts have held that it is an error of law to refuse to admit evidence solely because it is not admissible in courts (*City of Toronto and Canadian Union of Public Employees, Local 79*, (1982), 35 O.R. (2d) 545; *Canada (Attorney General) v. Basra*, 2010 FCA 24).

48. The Committee's analysis, therefore, focused on whether it would be "appropriate" to introduce the report into evidence.

49. In opposing the reports admission, counsel for Mr. Kwochka raised the following concerns:

1.) Mr. Kwochka was not a participant in the inquiry, was not given notice of a potential adverse finding and was not able to cross-examine the witnesses at the inquiry;

2.) The *CUPE* decision is distinguishable for, among other reasons, the fact that the conduct of the employee referenced in the inquiry report was specifically within the mandate of the inquiry. It was not within the terms of reference for the Barclay inquiry to investigate matters related to Mr. Kwochka's conduct;

3.) Some of the evidence heard by the Inquiry Officer is not available to the Committee or Mr. Kwochka. It isn't possible to determine how the Inquiry Officer assessed the evidence or what evidence he considered in making some of the fact findings in the report;

4.) It is not possible to determine what standard of proof was used by the Inquiry Officer in making fact findings. Paragraph 78 of the report states "there is no legal onus of proof on the parties to a commission of inquiry and no standard of proof by which evidence must be evaluated";

5.) If the Committee rules that the report is admissible it will be very difficult for Mr. Kwochka to know how to respond to the report. He will not know the weight that the Committee will give to the fact findings in the report;

6.) If the Committee disregards the statements in the Barclay Report that relate to Mr. Kwochka, the remainder of the report is irrelevant to issues at the hearing and therefore not admissible;

7.) Admitting the Barclay Report would be tantamount to reversing the onus of proof and requiring Mr. Kwochka to prove the report is inaccurate;

8.) If the Committee admits the Barclay Report, it will be affected by the comments made in the report about Mr. Kwochka;

9.) Accepting the report is likely to lengthen, not shorten, the hearing.

50. The Committee considered each of these objections but concluded that despite those concerns, the report is admissible into evidence as it relates to the fact findings that are not findings of fact related to Mr. Kwochka's conduct.

51. The fact findings from the Barclay Report are reliable evidence. The Rural Municipality and reeve Eberle were both represented in the hearings, cross-examined witnesses and their counsel filed detailed written briefs on their behalf. The Barclay Report also noted three other counsel who appeared before the inquiry. The evidence given by witnesses at the inquiry was, therefore, tested by cross-examination conducted by experienced legal counsel. The Inquiry Officer was also assisted by legal counsel throughout the inquiry.

52. The fact findings of such an inquiry have sufficient reliability to justify being admitted into evidence.

53. The issue for the Committee was whether admitting the evidence would be prejudicial to Mr. Kwochka and whether any prejudice would outweigh the probative value of the evidence.

Would Admitting The Report Result In Unfairness Because Mr. Kwochka Was Not A Participant In The Inquiry, Nor Was He Able To Cross-Examine The Witnesses At The Inquiry?

54. The Committee accepts that there is a concern with respect to comments made in the Barclay Report about Mr. Kwochka's conduct.

55. The Committee particularly notes the following two comments made in the report:

> "In summary, while I would not necessarily conclude that such a practice must be avoided in every case, having regard to the contentious nature of the Wascana Village Development and the active role the RM's solicitor had in relation to negotiations with the Ministry, the concurrent legal representation that existed during the time period described above should not have been permitted to continue (page 47).

> In interpreting the above opinion, I am making the assumption that the RM's solicitor would have been aware of Reeve Eberle's practice of given a bare declaration of his pecuniary interest and recusing himself when matters related to Wascana Village arose at Council meetings. In my view, the above statement contemplates a suggestion that more was required in light of the unique nature of his agreement(s) with the Developer. At this point in time the RM's solicitor was also acting for the Developer and as such, must have been acutely aware of the content of Reeve Eberle's agreement. In his testimony, Counselor Repetski indicated that he interpreted the April 2013 Opinion similarly. (page 80)"

56. In addition, the Inquiry Officer criticized an aspect of an opinion provided by Daniel Kwochka to Reeve Eberle at pages 94 and 95 of the report.

57. These are examples of situations where the Barclay Report makes findings of fact or draws inferences about Daniel Kwochka's conduct.

58. At this early stage of the hearing, it appears to the Committee that it should be relatively simple for the CIC to lead direct evidence related to these issues.

59. In contrast to the comments or findings of fact related to Daniel Kwochka, the remaining findings of fact, particularly as they relate to Reeve Eberle, were very much contested throughout the inquiry. The Committee is not convinced that Mr. Kwochka's inability to cross-examine witnesses in relation to those issues produces unfairness to Mr. Kwochka.

60. For these reasons, the Committee concludes that it would not be unfair to Mr. Kwochka to allow the evidence of fact findings that are not findings of fact related to his conduct into evidence.

Is The *Cupe* Decision Distinguishable As It Only Applies To Situations Where The Fact Findings Relate To Individuals Who Are Specifically The Subject Of The Inquiry?

61. The reasons for the partial admissibility of the Barclay Report are described earlier in these reasons. When the findings of fact and comments made by the Inquiry Officer related to Mr. Kwochka are excluded, the remainder of those fact findings fall squarely within the mandate of the inquiry.

Would It Be Unfair To Mr. Kwochka To Admit The Report As Some Of The Evidence Considered By The Inquiry Officer In Reaching His Conclusions Will Not Be Available To Mr. Kwochka Or The Discipline Committee?

62. The Committee has concluded that this may affect the weight that could be attributed to the evidence in the Barclay Report, but is not a barrier to its admissibility. In general terms, the report references the evidence heard by the inquiry and provides reasons for the inquiry reaching the conclusions that it did.

Would It Be Unfair To Mr. Kwochka To Admit The Report In Light Of The Comments At Page 78 Of The Report That "There Is No Legal Standard Of Proof On The Parties…"?

63. The Committee interprets these comments to relate to how the Inquiry Officer would reach a conclusion whether a particular fact had been proven, rather than stating that the Inquiry Officer could find facts to be proven without first finding that such a fact was more probable then not. The Committee does not interpret these statements to suggest that the fact findings by the Inquiry Officer followed a less rigorous process than is required in law society discipline proceedings.

64. In disciplinary proceedings there is a burden on the regulatory body to prove facts on a balance of probabilities. In an inquiry, the Inquiry Officer will call witnesses and the parties do not have a burden of proof. In relation to the Barclay inquiry, there was no burden of proof on Mr. Eberle, or the RM, or any of the others who appeared before the Inquiry to prove anything. The Committee considered the comments of that Inquiry Officer in that context and did not interpret those comments to suggest that the Inquiry Officer could find facts to be proven without first finding that such a fact was more probable then not.

Would It Be Unfair To Mr. Kwochka To Admit The Report As He Cannot Know What Weight The Committee Will Attribute To The Evidence In The Report?

65. In the Committee's view, this applies to all evidence from any hearing. A party cannot know what weight the decision maker will attribute to any evidence at a hearing.

66. A Committee can only determine what weight to attribute to the evidence in the context of all of the evidence at the hearing.

67. With the admission of the report into evidence, Mr. Kwochka will know what evidence is before the Committee. It is not unfair to Mr. Kwochka to introduce that evidence.

If The References To Mr. Kwochka Are Expunged From The Report, Is The Remainder Of The Report Relevant?

68. The Committee has concluded that the remainder of the report provides relevant information, particularly as it relates to the conduct of Mr. Kwochka's clients. Among other allegations in the charges are that Mr. Kwochka "did allow himself to become a dupe to an unscrupulous client or a third-party". Conduct of that client or third-party is obviously relevant to the discipline hearing.

Would admitting the report be tantamount to reversing the onus of proof and requiring Mr. Kwochka to prove the report is inaccurate?

69. The Committee is certainly cognizant of the fact that the burden of proof lies on the CIC throughout. There isn't an onus on Mr. Kwochka to disprove the CIC's case.
If faced with evidence which may point to conduct unbecoming, there may be an evidentiary burden on Mr. Kwochka to lead evidence. However, the onus of proof remains on the CIC throughout.

70. Admitting the report would not be tantamount to reversing the onus of proof.

Will the Committee be affected by the comments made about Mr. Kwochka in the report, even if it rules that those comments are not admissible?

71. The Committee wants to assure Mr. Kwochka that it is committed to providing a fair hearing into the charges. As part of that responsibility, the Committee has a responsibility not to allow itself to be influenced by any inadmissible evidence that it may hear at any point in the hearing. That applies to the Barclay Report as well as any other evidence that may be ruled inadmissible.

72. The Committee will not be influenced by the findings of fact or the comments made by the Inquiry Officer about Mr. Kwochka.

Will admitting the report lengthen rather than shorten the hearing?

73. CIC Counsel stated that admitting the report would significantly shorten the hearing; counsel for Mr. Kwochka stated admitting the report would lengthen the hearing.

74. The Committee did not consider it relevant to its decision whether admitting the report will lengthen or shorten the hearing. The Committee has an obligation to hear and admit relevant evidence unless there is a reason not to do so.

75. For the reasons above, the Committee has concluded that the report is admissible, but without the findings of fact and comments made by the Inquiry Officer related to Mr. Kwochka.

ANALYSIS - ARE THE FINDINGS OF FACT BINDING UPON THE DISCIPLINE COMMITTEE?

76. The Committee rejected the CIC's position that "with the exception of matters specifically dealing with Mr. Kwochka's conduct all findings of fact, inferences drawn from findings of fact and determinations of matters of law are to be taken to be binding upon the Hearing Committee". This argument is based upon an abuse of process analysis, as set out in the CIC's brief.

77. Neither legal counsel could point to any decisions in which a court or tribunal had concluded that findings of fact from a decision were binding on persons who were not parties to the proceeding in which the decision was made. Mr. Kwochka was not a party to the Barclay Inquiry and did not participate in that Inquiry.

78. The Committee concluded that it would be an unwarranted extension of the abuse of process doctrine to conclude that Mr. Kwochka could not challenge findings of fact made by the Inquiry Officer about, for example, Reeve Eberle.

79. At the conclusion of the hearing, the Committee will consider all evidence led at the hearing and will determine what weight should be given to each piece of evidence that is admitted into evidence.

80. The Committee does not consider itself bound to adopt the findings of fact from the Barclay Report; nor is the Committee prepared to rule that evidence which contradicts the findings of fact set out in the Barclay Report is inadmissible.

81. The Committee thanks both counsel for their able assistance in dealing with this somewhat difficult question.

Dated the 21st day of December, 2017.

"Martin Phillipson", Chair

"Della Stumborg"

"Bryan Salte, Q.C."

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Hearing Committee: Martin Phillipson, Chair
Della Stumborg
Bryan Salte, Q.C.

Counsel: Drew Plaxton, Q.C., Counsel for the Conduct Investigation Committee
Gordon Kuski, Q.C., Counsel for Daniel Kwochka

DECISION

82. The Hearing Committee accepts Mr. Kwochka's admission that he is guilty of conduct unbecoming a lawyer.

83. The Hearing Committee accepts Mr. Kwochka's admission that his conduct in acting and continuing to act for a client where there was a conflict of interest and where there was no informed consent by a second client to act is conduct unbecoming a lawyer.

84. The Hearing Committee accepts Mr. Kwochka's admission that his conduct in failing to act with integrity and breaching the duty of loyalty owed to a client is conduct unbecoming a lawyer.

85. The Hearing Committee accepts the joint submission that Mr. Kwochka be reprimanded, be fined $20,000.00 and be required to pay costs of $35,000.00.

FACTUAL BACKGROUND

86. The Hearing Committee received an Agreed Statement of Facts signed by both counsel. That Agreed Statement of Facts is reproduced at the end of this decision.

87. In the Agreed Statement of Facts Mr. Kwochka admitted that he represented or provided advice to the Rural Municipality of Sherwood (referred to in these reasons as the "RM"), Kevin Eberle, who was at that time the Reeve of the RM, and the Great Prairie Development Corporation (referred to in these reasons as the "Developer"). The Developer was attempting to develop certain

land with the RM for a high-density residential development. The Reeve and the Reeve's wife entered into agreements with the Developer to sell land to the Developer.

88. The agreements between the Developer and the Reeve provided that the Reeve would receive a percentage of the net profits realized by the development. In order for the development to proceed, the RM needed to obtain approval for an official community plan and needed to amend zoning bylaws.

89. Mr. Kwochka prepared the agreements between the Reeve and the Developer but did not disclose the existence of the profit sharing plan to the RM. Members of the RM Council were only aware that there was an agreement between the Reeve and the Developer to sell lands to the Developer, subject to obtaining approval for an official community plan zoning bylaws being amended.

90. Concerns related to the circumstances surrounding the development resulted in the appointment of R.L. Barclay, Q.C. as an inspector and later an Inquiry Officer to enquire into the conduct of members of council and agents of the RM as well as the affairs of the RM, including whether members of council had acted inappropriately.

91. When R.L. Barclay, Q.C. was appointed as an inspector, Mr. Kwochka ceased to act for the Developer. The Barclay Report, available at http://publications.gov.sk.ca/documents/313/89689-Final%20Report-%20Sherwood%20V1.pdf was very critical of the Reeve's conduct.

92. In the Agreed Statement of Facts, Mr. Kwochka acknowledged the following:

> 1) "There were conflicts of interest between the RM, the development company GP and the Reeve. There was a substantial risk these conflicts would materially and adversely affect Kwochka's duties to his clients."
>
> 2) "Kwochka was aware of the Reeve's interests and owed a duty to the RM to disclose this interest to the RM in that it was information that may affect the interests of the RM in the matters at hand. This the member did not do."
>
> 3) "The member acknowledges he owed a positive duty to ensure the RM and its councillors were aware of the Reeve's pecuniary interest as being very material to matters under their consideration."
>
> 4) "The Member admits that he failed to avoid conflicts of interest, in that he acted and continued to act for a client RM where there was a conflict of interest between his client RM and his client GP, where there was no fully informed or voluntary consent after disclosure in writing or otherwise by the RM for him to act or continue to act on behalf of GP in relation to the Wascana Village Project."
>
> 5) "The Member further admits that he ought to have, but failed to disclose to the RM, or ensured that the RM was aware of the true interests of the Reeve in the

> Wascana Village Project and therefore failed to act with integrity and acted in breach of the duty of loyalty to his client the RM as this was a material fact Council should have known which may have affected the interests of the client RM."

PROCEDURAL ISSUES

93. The parties agreed that the Hearing Committee was properly constituted and that the matter was properly before the Hearing Committee.

94. The Hearing Committee had previously been asked to address two issues. In a separate ruling, the committee refused the Conduct Investigation Committee's request that a witness be permitted to testify by videoconference.

95. In a separate ruling the Hearing Committee concluded that:

> 5.) "The Barclay Report was admissible as it related to findings of fact that were not findings of fact related to Mr. Kwochka's conduct;
> 6.) The findings of fact and comments made in the Barclay Report related to Mr. Kwochka were not admissible in evidence;
> 7.) The parties were free to introduce evidence which was inconsistent with or which contradicted the findings of fact in the Barclay Report. The Committee was not bound to accept the findings of fact from the report;
> 8.) The Committee would determine what weight, if any, would be given to the findings of fact in the Barclay Report."

96. At the hearing on January 15, 2018, Mr. Kwochka admitted that he was guilty of conduct unbecoming a lawyer as set out in paragraphs 1.ii and 3. of the Amended Formal Complaint. Those portions of the Amended Formal Complaint stated:

> *"[T]hat Daniel Kwochka, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:*
>
> *1. did fail to avoid conflicts of interest in that he acted and continued to act for a client:*
> *2. where there was a conflict of interest where there was no informed consent (by RM) to act, or any consent at all after disclosure (and no consent in writing or later reflected in writing).*
> *3. did fail to act with integrity and did breach the duty of loyalty owed to his client RM."*

97. Counsel for the Conduct Investigation Committee then withdrew the remainder of the Amended Formal Complaint.

98. Counsel for the Conduct Investigation Committee raised the question whether the Hearing Committee's reasons for its decision or the Agreed Statement of Facts should be de-identified before making them available to the public. Counsel for Mr. Kwochka took the position that the facts were well known to the public and that the identities of the participants were publicly

available in the Barclay Report. Consequently, nothing would be gained by de-identification or by limiting public access to any of the information before the Hearing Committee.

99. The Hearing Committee concluded that the information before the committee did not justify de-identifying persons identified in these reasons, nor did it justify limiting public access to the Agreed Statement of Facts filed at the hearing.

REASONS FOR DECISION

100. Counsel for the Law Society Conduct Investigation Committee and Counsel for Mr. Kwochka submitted a joint submission that Mr. Kwochka be reprimanded, be fined $20,000.00 and be required to pay costs of $35,000.00.

101. The Saskatchewan Court of Appeal concluded in *Rault v. The Law Society of Saskatchewan*, 2009 SKCA 81, that a Hearing Committee should accept a joint submission unless it decides that the disposition in the joint submission is inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest. A similar conclusion was reached in *Pankiw v. Chiropractors' Association of Saskatchewan*, 2009 SKB 268.

102. Consequently, the issue for the Hearing Committee was not what penalty it would impose in the absence of such a joint recommendation, but rather whether the terms of the joint submission were inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest.

103. For the reasons which follow, the Hearing Committee accepted the joint submission.

104. An initial concern of the Hearing Committee was whether the sanction, which did not include a suspension, was a sufficient expression of the seriousness of Mr. Kwochka's conduct and whether that sanction was consistent with the factors in establishing penalty in the decision *Law Society of Saskatchewan v. Cory Bliss*, 2010 LSS 4. Those factors are:

a) Was there a specific duty that was breached?
b) What conflicting duties was the Member under and how evenly were they balanced?
c) Was the Member favoring his personal interests over his duties to his clients?
d) Were the circumstances and duties such that it is appropriate to conclude that the Member must have known at the time, or be taken to have known, at the time that the course of action chosen was wrong?
e) Was it an isolated act?
f) Was it planned?
g) What opportunity did the Member have to reflect on the act or the course of action?
h) What opportunity did the Member have to consult with others?
i) What result flowed from the course of action taken?
j) What subsequent steps could have been taken to correct the error or its consequences and were such steps taken?

105. The Committee noted particularly the following concerns:

1) Mr. Kwochka is a partner in a large firm in Regina and has many years of experience practising law;
2) Mr. Kwochka had opportunity over several months to reflect on his course of action;
3) Mr. Kwochka had opportunities to consult with others;
4) If Mr. Kwochka had disclosed the information to the RM that he improperly withheld, the RM's approach to the development may have been different and may not have resulted in the investigation and Barclay Report;
5) The comments about Mr. Kwochka and the RM in the Barclay Report are publicly available and had the potential to bring the legal profession into disrepute.

106. The Hearing Committee agrees with the position of the Conduct Investigation Committee that a lawyer's obligation to carry on his or her practice with integrity is foundational to the practice of the profession. Loyalty and a client's confidence that he or she enjoys a lawyer's loyalty is foundational to the proper practice of the profession and society's confidence in the profession and the judicial system.

107. If clients cannot rely on the undivided loyalty and candour of the lawyers who they retain, the legal system, the reputation of the legal profession and the ability of lawyers to act in the best interests of their clients all suffer.

108. The Hearing Committee also agrees with the position of the Conduct Investigation Committee that Mr. Kwochka's conduct was very serious and offends the necessities of integrity, honour and loyalty to the client. These activities could well call for a period of suspension.

109. In considering all of the information before the Hearing Committee, the committee concluded that its concerns did not justify rejecting the joint submission. As set out in *Rault*, the joint submission could only be rejected if the joint submission was inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary to the public interest.

110. A number of possible mitigating factors were put forward for the Hearing Committee's consideration. Those were:

1) Mr. Kwochka has no prior discipline record with the Law Society;
2) Mr. Kwochka's conduct did not appear to be motivated by personal gain in the impugned actions;
3) By entering guilty pleas, he saved the Law Society considerable efforts in avoiding what would have been a lengthy hearing and saved at least one witness considerable inconvenience that would have been incurred if she had to travel from Nunavut to testify in Regina.

111. The Hearing Committee accepted that the lack of a prior discipline record and the guilty plea were appropriately considered as mitigating factors.

112. The Hearing Committee gave little weight to the assertion that Mr. Kwochka's conduct was not motivated by personal gain. While Mr. Kwochka did not receive a personal benefit in the transactions between the Reeve and the Developer, that is not necessary for there to be a conflict of

interest or a failure to meet the duty of loyalty to a client. By continuing to act for both the RM and the Developer after there was a conflict of interest, Mr. Kwochka continued to maintain a lawyer-client relationship with both clients and failed to meet his ethical obligations.

113. The Conduct Investigation Committee noted that the fine proposed, $20,000.00, is double the largest fine previously imposed in Saskatchewan.

114. Most important to the Conduct Investigation Committee's conclusion that the joint recommendation was not inappropriate; not within the range of sentences; unfit or unreasonable; and/or contrary *to* the public interest was the explanation provided at the hearing related to the circumstances which resulted in Mr. Kwochka continuing to act for both the RM and the Developer.

115. Mr. Kwochka initially acted for the Developer in what was to be a simple sale and purchase of land in which the RM and the Developer had parallel interests. The conflict of interest only developed after the nature of the agreement between the Developer and the Reeve changed and provide a share of the profits from the development to the Reeve.

116. Mr. Kwochka did not recognize the developing conflict of interest. His actions were as a result of inadvertence, rather than a deliberate disregard for his ethical obligations.

117. The Hearing Committee was advised that the costs to the Law Society exceeded the $35,000.00 in the joint submission. The Hearing Committee was not advised of the total amount of those costs. After considering the information provided to the Hearing Committee summarized above, the Committee accepted the joint recommendation.

Dated the 26th day of January, 2018.

"Martin Phillipson", Chair

"Della Stumborg"

"Bryan Salte, Q.C."

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Amended Formal Complaint dated the 2nd day of June 2017 alleging the following:

> **That Daniel Kwochka, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:**
>
> **1. did fail to avoid conflicts of interest in that he acted and continued to act for a client:**
>
> i. **under circumstances where he could not reasonably believe he would be able to represent the client without having a material adverse effect upon the**

representation of or loyalty to another client (RM), and / or

ii. **where there was a conflict of interest where there was no informed consent (by RM) to act, or any consent at all after disclosure (and no consent in writing or later reflected in writing).**

2. did prefer the interests of another client (GP) and / or a third party (or client or near client), the Reeve over the interest of his client RM.

3. did fail to act with integrity and did breach the duty of loyalty owed to his client RM.

4. did fail to act with honesty and candor when advising his client RM and / or did through negligence, willful blindness, recklessness or failure to exercise due diligence, fail to ensure that his client RM was aware of the interest of the Reeve in the "Wascana Village" development and related matters, including the nature of the interest of the Reeve in certain agreements made with his client, GP from time to time.

5. did allow himself to become a dupe to an unscrupulous client or a third party.

PRELIMINARY MATTERS

118. Daniel Kwochka (hereinafter sometimes "Kwochka" or "the Member") is and was at all times material a practicing Member of the Law Society of Saskatchewan (hereinafter sometimes "the Law Society") and is subject to the provisions of the *Legal Profession Act, 1990* (hereinafter sometimes "the *Act*") as well as the Rules of the Law Society (hereinafter sometimes "the Rules"). Attached as Schedule "A" is a copy of a Certificate of Status of the Executive Director of the Law Society dated the 21st of April 2017 confirming the Member's practicing status.

BACKGROUND OF THE COMPLAINT

119. The Complaint originated from the contents of the Final Report of the Inspection and Inquiry into the RM of Sherwood No. 159 by the Honourable R.L. Barclay, Q.C. dated December 30, 2014 (the "Barclay Report"). The complaint was then reviewed by Larry Zatlyn, Q.C., Designate Complainants Counsel, who, by letter dated April 16, 2016 (the "Zatlyn Letter"), referred the matter to the Law Society which then was referred to a Conduct Investigation Committee (hereinafter sometimes "the CIC") consisting of Gregory Walen, Q.C. and Evert van Olst, Q.C.

120. The CIC filed a report directing that the Chair of Discipline appoint a Hearing Committee to hear and determine the complaints against Kwochka to determine if he is guilty of conduct unbecoming. As a result of the direction in this report Brenda Hildebrandt, Q.C., Chair of the Discipline Committee for the Law Society of Saskatchewan appointed a Hearing Committee in the within matter, a copy of which is attached as Schedule "B". This appointment was later amended on the 2nd of June 2017 to appoint a replacement Member on the Hearing Committee a copy of which is attached as Schedule "C". A Formal Complaint dated the 20th of May, 2017 and an Amended Formal Complaint dated the 2nd of June, 2017 were laid, copies of which are attached and marked as Schedules "D" and "E" respectively. A Notice of Hearing was then issued on the 28th day of August, 2017, a copy of which is attached as Schedule "F". The

Member admits proper service of all of the above-noted documentation.

121. The Member and the CIC agree the matters set forth in the Formal Complaint are properly before the Hearing Committee and the Hearing Committee has jurisdiction to deal with same. Neither the CIC nor the Member take objection with the composition of the Hearing Committee.

122. The Member intends to plead guilty to count number 1(ii) and count 3 in the Amended Formal Complaint. The CIC intends to withdraw count number 1(i), count number 2, count number 4 and count number 5.

123. The CIC and the Member have agreed to a joint submission concerning penalty. The parties have agreed to ask the Hearing Committee impose the following penalty:

1. The Member be reprimanded.
2. The Member pay a fine in the amount of $20,000.00.
3. The Member pay costs in the amount of $35,000.00.

BACKGROUND FACTS

124. Kwochka is a partner of the law firm of McKercher LLP practising out of Regina, Saskatchewan. The Member was admitted to the Law Society in July of 1997. The Member has no prior discipline record with the Law Society.

125. The complaint against Kwochka arises out of his involvement in representing and / or giving advice to a rural municipality (RM) located near Regina, a development company (GP) and the Reeve of the RM. The matter central to Kwochka's involvement was a project known as "Wascana Village", a high-density residential development. This project contemplated the acquisition of a number of parcels of land in the RM. The Reeve and his wife as well as number of other councillors of the RM owned lands within the RM boundaries. Certain parcels of land were also owned by relatives of the Reeve. In order for this project to move forward, it was necessary for the RM to receive provincial approval of an official community plan (OCP) and undertake certain zoning bylaws and miscellaneous other related matters. There were a number of challenges to obtain this approval, including difficulties in obtaining suitable sewer and water services for the village. The proposed acquisition of land for this project included land owned by the Reeve and his wife (hereafter referred to simply as land owned by the Reeve), an unrelated realty company and relatives of the Reeve. The proposed development was hastily put together and placed before Council without any study or professional reports from the RM staff although this was not known to Kwochka.

126. As a result of certain concerns with the management, administration or operations of the RM, the Honourable R.L. Barclay, Q.C. was appointed inspector pursuant to The Municipalities Act. His terms of reference included inspecting the history, facts and circumstances concerning an OCP and zoning bylaws in relation to the proposed Wascana Village development. Inspector Barclay was later appointed as an Inquiry Officer to enquire into the conduct of Members of council and agents of the RM as well as the affairs of the RM, including whether members of council had acted inappropriately. The Barclay Inquiry (hereinafter sometimes "the Inquiry")

was concerned primarily with the activities of the then Reeve of the RM. The matters set forth in the report led to the complaint to the LSS in the within matter.

127. Many of the facts surrounding the issues before the Committee are canvased in the Barclay Report. The report itself is approximately 140 pages in length. Copies of the report have been filed with the Committee. An electronic version of the report is found at: http://www.saskatchewan.ca/government/municipal-administration/municipal-inquiries. The parties ask the Committee refer to the Barclay Report for a further elaboration of the background facts concerning the matters before it except those findings of fact or other comments in relation to Kwochka's conduct and insofar as any findings in the Barclay Report are inconsistent with facts set out in this statement of facts.

CHRONOLOGY AND NARRATIVE

128. Kwochka was first contacted by a councillor or former councillor of the RM late in the year 2011 who advised Council was interested in the provision of legal services. In response to this request, Kwochka forwarded a promotional letter to the RM on the 26th of November, 2011 which resulted in a general retainer to act on behalf of the RM and its interests. Kwochka began acting for the RM during or about the month of November, 2011 and was formally appointed solicitor to the RM for the years 2012, 2013 and 2014. During this period of time he rendered general legal advice to the RM and acted on behalf of the RM in many matters in addition to OCP and related issues of which Wascana Village was a part.

129. Although the RM did retain one or more other counsel to act on its behalf during this period of time the Member was the general advisor to the RM. The Member acted in this capacity until approximately the month of June 2014 when the Barclay Inspection Order was made at which point he was not going to act for the RM in the inspection. One of his partners however acted on behalf of the RM in the Barclay Inquiry and Kwochka continued as general counsel to the RM until January, 2015. The Member also ceased acting for GP in the month of July 2014 as a result of the inspection order. The Member acted on behalf of both the RM and GP in relation to OCP and Wascana Village related matters from approximately November 2011 until June of 2014.

130. During or about the month of May 2012, the Reeve of the RM was approached by one of the principals of GP concerning sale of his land for the Wascana project. The Reeve had a personal pecuniary interest in matters to be dealt with by the RM council, which would cause concerns regarding conflicts of interest. Upon the request of the Reeve, Kwochka drew up a draft disclosure letter for the Reeve to present to council. Although Kwochka was not formally retained by the Reeve, he did offer the Reeve legal advice on this and at least one other occasion. Kwochka did not act on behalf of the Reeve in transactions concerning acquisition of his lands and related matters. The Reeve was represented by another law firm in Regina. There was no evidence at the Inquiry that this letter was ever signed or provided to council and others. The Inquiry found however, that a draft of the letter was provided to two councillors and the Deputy Reeve and the administrator was also aware that the letter existed.

131. It appears one or more councillors believed the Reeve's interest in the Wascana Village Project was a simple real estate transaction and his dealings were completed at quite an early

stage and it was stated the Reeve advised that he was not concerned with the OCP in that the transaction concerning the sale of his lands was complete and he had been paid.

132. The disclosure letter prepared by Kwochka for the Reeve was addressed to Members of Council concerning the OCP of the RM. The letter advised that the Reeve and his wife had received an unsolicited offer from a developer wanting to purchase some of their lands and they had entered into a sale agreement with the developer. Further, he was declaring a pecuniary interest and would be recusing himself in discussions that relate to the sale. The letter also states that he had consulted with counsel for the RM (being Kwochka) to determine if he would be in a conflict of interest dealing with more general initiatives, such as its efforts to have the OCP finalized by the government. The letter further advised that he had been assured by legal counsel that holding a view in common with the majority of voters in the RM as to the provisions of the OCP or any other matter was not a pecuniary interest within the meaning of *The Municipalities Act* or the common law. He went on to say that he was going to recuse himself also from the discussions and voting on matters concerning the OCP but intended to participate in ongoing discussions with the City of Regina concerning joint planning. A copy of the disclosure letter (dated 29 May 2012) is attached as Schedule "G".

133. The Reeve made a bare declaration of conflict of interest to council without providing any particulars. The Barclay Report found the Reeve did declare pecuniary interest when matters relating to Wascana Village came before council, but he only declared the fact that he had an interest without further details and would then leave council chambers. It appears other councillors who were concerned about their positions as they too owned land in the RM impacted by the proposed OCP.

134. As a result, Kwochka was asked to prepare an opinion for the RM Council. Kwochka prepared and forwarded to the RM an opinion letter dated 18 June 2012, directed to the attention of "Reeve and Council". In this letter, the Member advised that he had been asked to provide an opinion in relation to Part VII of *The Municipalities Act*, which deals with disqualifying pecuniary interest of members of municipal Councils. Specifically, the question was distinguishing between general interests that would benefit a community of taxpayers and more narrow interests which would primarily benefit a member of Council, and more specifically whether adoption of the proposed OCP might be a disqualifying pecuniary interest for members of Council who owned land in the RM.

135. In June the principal of GP advised the Reeve it was waiving the conditions in favour of the GP. The agreement however lapsed due to lack of financing and GP's $50,000.00 deposit was forfeited.

136. Kwochka referred to *The Municipalities Act* and a number of authorities (one being a Supreme Court decision which mentions the common law concerning conflicts). In the end, Kwochka advised that the adoption of the OCP was clearly a community interest rather than personal interest and this was an exception recognized by *The Municipalities Act* and that no member of Council would have a pecuniary interest solely by reason of owning land. He goes on to say councillors would have a pecuniary interest in any decisions relating to subdivision or rezoning of their own land as these matters would be personal to him or her. The Member states

he was throughout aware of the relevant common law of conflicts of interest but did not include same as he did not consider it relevant to the requested opinion and his opinion was restricted to the obligations under *The Municipalities Act.* A copy of the 18 June 2012 opinion letter is attached as Schedule "H".

137. A few days after this opinion was given to Council, Kwochka was called by a principal of GP who was purchasing land from the Reeve (and his wife), the Reeve's relatives and an unrelated corporation. This call was likely as a result of a suggestion from the Reeve. Kwochka was retained by GP during or about June of 2012, originally for the purpose of transferring land. At that point, he believed this was a standard real estate transaction. The Member advises he had no knowledge of the proposed development.

138. Both the administrator and Council were generally aware of the fact Kwochka was representing both the RM and GP, but at no time during the relevant period of time was the Council of the RM or the administrator aware of the complete pecuniary interest of the Reeve in the Wascana Project and therefore could not have given informed consent to the Member acting for both GP and the RM. Further there was no consent by the RM given in writing or later reflected in writing. At no time did the Member suggest to the RM it ought to seek independent legal advice concerning the issue of him representing GP as well as the RM.

139. Throughout 2012 and into 2013 discussions continued with the provincial government concerning approval of the OCP but this was not forthcoming. As time went on, additional agreements were being made between GP and the Reeve. Kwochka prepared the last few agreements on behalf of GP. In January of 2013, GP instructed Kwochka to prepare an agreement for the Reeve to serve as a Director of GP and to participate in net profits of the project although neither were ever executed. A new agreement was entered into on the 19th of April, 2013. The purchase price was now in excess of $11 million dollars, also the Reeve was, as a deferred portion of the purchase price, to receive a profit share percentage of the net profits of the development to a maximum of $6 million dollars. This was conditional on rezoning and the agreement did not close.

140. On the 18th of April, 2013, Kwochka prepared another opinion in relation to conflicts of interest of elected officials. This opinion was directed to the Reeve alone and was flagged that it was intended for the Reeve only and could not be relied on by any other party without (the law firm's) prior written consent. It appears this document was forwarded only to the Reeve. At this point Kwochka knew the contents of the new agreement, having prepared the document. This opinion letter relates that the Reeve has or will be entering into an agreement to sell lands to a developer and the price is contingent upon adoption of land use, concepts within the OCP and rezoning of the lands. It then goes on to relate that "You have asked that we can clarify to what extent you can involve yourself in the proposed OCP and zoning bylaws given the agreement you have entered into.". The opinion then goes on to refer to the same portions of *The Municipalities Act* as the first opinion and further relates, more or less, the same authorities earlier relied on in the first opinion. The opinion states that the Reeve could continue to advocate for the OCP generally, the contents of which were fixed well in advance of his pecuniary interest arising, and notwithstanding that he had a personal interest in relation to his lands, he continued to share general interest with the community in relation to the OCP. Throughout the Reeve had

only made a bare declaration of interest to Council and had not provided details of his interest. The Member states this was not known to him. This opinion states that the Reeve “has a disqualifying pecuniary interest that needs to be disclosed to the rest of Council and the Administrator so that steps can be taken to avoid future conflicts. The opinion further advised the Reeve that he could not vote or participate in discussions concerning his lands nor direct planners or administrative personnel in relation to his lands. The opinion further states "you can continue to advocate for the OCP generally ….". A copy of the 18 April 2013 opinion letter is attached as Schedule "I".

141. The opinion of April of 2013 condones the Reeve's continued advocacy for the OCP, which had been amended to accommodate Wascana Village. Contrary to what is assumed in the opinion, the contents of the OCP were not fixed in advance of the Reeve's pecuniary interest. Above the purchase price escalating what had now changed is the Reeve was to have a percentage of profits from the development over and above what profit he would realize from the sale of his lands alone. At the Inquiry, the Reeve testified he relied heavily on legal advice provided to him by Kwochka when explaining his actions. In his report, Inspector Barclay appears skeptical of whether the Reeve noted the assumptive error but gave him the benefit of the doubt for the purposes of assessing his conduct.

142. In addition to the opinions noted above, Kwochka offered verbal advice to the Reeve and other councillors throughout this period of time. It was not unusual for Kwochka to receive instructions directly from the Reeve or Councillors on certain matters.

143. On or about the 20 September, 2013, the principal of GP, emailed Kwochka advising the Reeve had come back with a bigger "ask". Further, early in October 2013, Kwochka received emails from GP's consultant indicating that he had spoken with the principal of GP and stated "we think it's better that we take out the language of the 10% profit sharing, and stick this into a totally separate piece of paper. Possibly you can do up a 1 pager?". The email further went on "This PSA is going to be seen by the bank (TD, and they fund our other 'developer friends' in the province), and maybe others. The pure optics on this PSA with it in the agreement suggests he is getting a sweetheart deal, he's a partner in it etc... the press would have a hayday with this.". Later, "we do not want his 10% to be on title. He will have a paper agreement and that's it. We are very worried about the appearance in the 'public' on this front.". Further, a numbered company was suggested for the Reeve to hold (to try to protect identity).

144. The Member states he had no actual knowledge of what the Reeve told members of Council concerning his interest in the Wascana Project, but he believed that the Reeve had followed his advice. The Barclay Report found that the Reeve had disclosed to the Administrator that his arrangement with GP was conditional upon re-zoning. However, at no time did the Member inquire of either the Reeve or members of Council as to what had been disclosed to them concerning the Reeve's interest in the project nor did he disclose the full nature of the Reeve's interest. The Member ought to have known that this information would be significant in the RM determining whether or not it wished to continue to promote the Wascana Village project.

145. Kwochka drew two new documents, an agreement for sale and a profit sharing

agreement. The price for the three quarters of land had escalated. In addition, in the profit sharing agreement, the Reeve was to receive ten (10%) percent of the net profits realized by the development. It is estimated the total amount of the Reeve's projected compensation for the land sale and profit share related to the project to be something in the area of $57.7 million dollars. GP anticipated making a profit somewhat in excess of $400 million dollars.

146, On 31 December 2013, the government issued conditional approval of the OCP amendments and zoning bylaw amendments. However, this was on conditions to be satisfied. The conditions were not satisfied, and it appears the transactions were not completed.

147. In February 2014, the RM approved another development plan by GP, which was submitted to the government in April 2014. The government rejected the February plan, in that the conditions still had not been met and the amendments remained subject to approval till December 2015.

148. The Reeve remained involved throughout in advancing the Wascana Village concept. Despite Kwochka's April opinion, he was involved in directing planners and other administrative personnel. He did not disclose the true nature of his interest in the transactions and Wascana Village and attempted on at least two occasions to conceal his involvement. On one occasion during the Spring of 2013, he instructed the RM Administrator and the RM Planner to delete any emails concerning Wascana Village that he had been copied on. Also, it appears he instructed the Administrator to destroy hard copy documents that would have shown he was involved. The Member was not aware of these activities but was aware the Reeve continued to be involved in OCP related matters.

149. On June 16, 2014, the Honourable R.L. Barclay, Q.C. was appointed Inspector. In July of 2014 Kwochka ceased acted for GP as a result of the Inspection Order being made. The Member advises his firm felt it would be very difficult to provide representation to both the RM and GP. Although Kwochka did not act for the RM throughout the inspection, one of his partners did.

150. At the time the Member received instructions from his client GP to draw the agreements of November of 2013, he would have received the emails from GP in October of 2013 concerning how the agreements should be structured.

151. Inspector Barclay found the Reeve did not disclose the true nature of his interests to Council. Kwochka was aware of the Reeve's involvement in general OCP activities and further aware of the terms of the agreements between the Reeve and GP and the profits the Reeve stood to make if the development went ahead. Kwochka did not take active steps to ensure the members of Council were aware of the Reeve's actual interest.

152. A number of councillors testified at the Inquiry and had varying responses when asked what would have occurred if they had known more details of the Reeve's involvement. They range from believing the Reeve should have resigned; believing something was wrong and wanting to seek legal advice; to one Councillor stating "what an agreement ... I wish I could have been in that situation". The Barclay Report determined that the Reeve's decision to continue with

attempting to obtain approval for the OCP required him to be open and honest with Council concerning his interests. He did not suggest he should have disclosed specific figures, but he should have disclosed the fact that his agreements were subject to rezoning and contained profit sharing on the entire development. This was not something Council would have reasonably contemplated.

153. The Inspector found the Reeve's conduct to be highly unethical and inappropriate. He should have had no involvement whatsoever in the concept plan and he was in a serious conflict of interest. Kwochka's failure to disclose important information to his client RM assisted the Reeve in his conduct.

154. There were conflicts of interest between the RM, the development company GP and the Reeve. There was a substantial risk these conflicts would materially and adversely affect Kwochka's duties to his clients. It is agreed under *The Municipalities Act,* for municipalities to be responsible and an accountable level of government, the Council are to make decisions that they consider appropriate and in the best interests of their residents and are accountable to those who elect them. Advancing the OCP and the Wascana Village concept may have been a good idea at some point in time. However, as matters progressed, the Reeve (and perhaps others) were pushing these matters ahead regardless. The Reeve's and Council's responsibility was to determine which route was best for the RM. The interests of the developer were to advance the OCP and the project and to make a profit from same. It appears the Reeve was motivated primarily, if not entirely, by self-interest and profit which interfered with his duties to the RM and its residents.

155. The agreements the Reeve made with GP, if known to other councillors, would likely have had a significant effect on whether the councillors would have continued to promote the OCP and the project.

156. Kwochka was aware of the Reeve's interests and owed a duty to the RM to disclose this interest to the RM in that it was information that may affect the interests of the RM in the matters at hand. This the Member did not do.

157. The Member acknowledges he owed a positive duty to ensure the RM and its councillors were aware of the Reeve's pecuniary interest as being very material to matters under their consideration.

158. The CIC and the Member reserve the right to present such further or other evidence at the hearing of the matter within as may be advised and not inconsistent with the facts herein agreed to.

ADMISSIONS BY THE MEMBER

159. The Member admits he is guilty of conduct unbecoming a lawyer in a number of respects as follows.

160. The Member admits that he failed to avoid conflicts of interest, in that he acted and continued to act for a client RM where there was a conflict of interest between his client RM

and his client GP, where there was no fully informed or voluntary consent after disclosure in writing or otherwise by the RM for him to act or continue to act on behalf of GP in relation to the Wascana Village Project.

161. The Member further admits that he ought to have, but failed to disclose to the RM, or ensured that the RM was aware of the true interests of the Reeve in the Wascana Village Project and therefore failed to act with integrity and acted in breach of the duty of loyalty to his client the RM as this was a material fact Council should have known which may have affected the interests of the client RM.